



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

HIGH COURT CRIMINAL CASE NO. EO77 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

MSUYA NGOLO LEWIS.....ACCUSED

RULING

1. By a notice of motion application dated; 24th November 2021, brought under the provisions of; Article 49 (1)(h), 2(5) & 6, 50 (2) and 27(1) of the Constitution of Kenya, 2010 and Section 123, 123 A and 125 of the Criminal Procedure Code, (Cap 75), Laws of Kenya, the applicant is seeking for orders that; the Honourable Court be pleased to admit him to bail or bond pending the hearing and determination of the case herein.
2. The application is supported by the grounds thereto and the applicant's affidavit of the even date. He avers in a nutshell that, on 25th October 2021, he was charged with the offence of; murder contrary to; section 203, as read together with section 204 of the Penal Code of Kenya, (Cap 63) of the Laws of Kenya. He entered a plea of not guilty on; 23rd November 2021, and has since been remained in custody.
3. That, prior to being arraigned in court, he voluntarily turned up when required to assist in investigations. Further, the alleged offence took place on and around November 2017, and the Investigation agency, Independent Policing Oversight Authority (IPOA), has indicated that, investigations into the alleged offence are complete. As such, if released on bail and/or bond he shall not in any way affect investigations and/or prosecution of this case.
4. In addition, neither the victims, witnesses nor investigation officer have deposed to, having been threatened or unduly influenced by him, with a view of interfering with investigations and the conduct of the case.
5. He further avers that; he has a constitutional right to bond or bail pending trial, entails the right to be presumed innocent, until proven guilty. That, he is a Kenyan citizen serving as a Police officer and has a permanent residence at Kasarani in Nairobi County where he resides with his family. He is ready and willing to attend court for trial without fail.
6. Thus, it is therefore, in the interest of justice that, he be granted bail and or bond on reasonable terms as there are no compelling reasons for his continued incarceration.
7. However, the application was opposed vide an affidavit of opposition dated; 24th November 2021, sworn by Patrick Ronoh, employed by Independent Policing and Oversight Authority (IPOA), as an investigator and a lead investigating officer of the team that carried out investigations in this matter.
8. That, in the course of investigations, the investigators were supplied with employment history and records of the accused person, where they gathered that, the accused has worked as a police officer at Kariobangi Police Station, for a continuous period of four (4) years as an investigator, cell entry, patrol duties and operation and manning crime report office.
9. As a result of that long stay at Kariobangi Police Station, the accused has proxies within Kariobangi and Huruma areas, that, he is likely to use to identify and intimidate witnesses. Further, statements recorded from several witnesses who witnessed the incident indicate that, they are receiving threats from persons believed to be accused's proxies and fear for their lives, if they come to court to testify against the accused person.
10. That, the accused person being a police officer is well trained in use of firearms and given the fact that, he has not been interdicted from National Police Service, he has the advantage of accessing firearms at will, thus, the investigators are apprehensive that, once released on bail, his presence in Kariobangi area is enough to instill fear among potential witnesses.
11. Further, although Article 49 (1) (h) of the Constitution of Kenya, 2010, provides a right to an accused to be released on bail, the right is

not absolute; same depends on the circumstances of each case hence discretionary.

12. The application was canvassed on the aforesaid materials and a list of authorities supplied by the applicant, albeit filed without the leave of court, but being case law per se, does not prejudice the Respondent. I have considered the said material and I find that, the starting point in considering the application for bail, is to appreciate the constitutional provisions of; Article 49 of the Constitution of Kenya.

13. The subject provisions states as follows: -

“An arrested person has the right, to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.”

14. It therefore follows that, admission to bail or bond during trial, is a constitutional right. As such any other law subordinate to the Constitution must be considered in the light of the subject provisions. The only caveat to the aforesaid provisions, is that, bail or bond will be denied where there are compelling reasons. The question is what amounts to “compelling reasons”? I shall revert back to it.

15. Pursuant to the aforesaid constitutional provisions, the provisions of; **section 123A of the Criminal Procedure Code, (Cap 75) Laws of Kenya**, state that:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.

16. Similarly, at paragraph 4.9, of the **Bail and Bond Policy Guidelines**, for Judicial officers, it is stated that, **the primary factor to consider in a bail or bond application, is whether the accused person will appear for trial if granted bail. Indeed, it offers the following non-exhaustive factors, for consideration in such applications as follows: -**

a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

b) The strength of the prosecution case.

c) The character and antecedents of the accused person.

d) The failure of the accused person to observe bail or bond terms.

e) The likelihood of interfering with witnesses.

f) The need to protect the victim or victims of the crime.

g) The relationship between the accused person and the potential witnesses.

h) The best interest of child offenders.

i) The accused person is a flight risk.

j) Whether the accused person is gainfully employed.

k) Public order, peace and security.

l) Protection of the accused persons.

17. The question that arises is; who has the burden of proving that, there are sufficient compelling reasons, to deny an accused person bail? It

is trite law that, he who alleges proves. In this case, the burden is on the prosecution to prove or demonstrate the existence of the "compelling reasons". So how has the prosecution herein discharged that burden?

18. To revert back to what constitutes compelling reasons, I associate myself with the holding of the court in the case of; in R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009, where is stated as follows:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution”

19. Be that as it may, the key issue herein is; the balance between the accused’s right to bail and the need to ensure that if he is released on bail or bond he will attend to the trial to conclusion. The prosecution has basically raised two issues as compelling reasons to deny the accused bail or bond.

20. The first issue is that; the accused will intimidate or threaten witnesses. However, I find that, the subject allegation at paragraph 6 of the affidavit opposing bail or bond application, is not supported by any evidence, the particular witnesses are not identified and neither, is there any statement by any witness that, the accused has threatened him or her with harm or otherwise,

21. Indeed, the offence herein is alleged to have been committed in the year 2017, and there is no evidence that, at any time, the accused intimidated any witness. Even then, the prosecution can use the available means under the witness protection scheme to protect the witnesses or take the necessary legal action against the accused if they have evidence.

22. The other reason advanced, is at paragraph 7 of the subject affidavit, to the effect that, the accused can easily access a firearm and injure or interfere with the witnesses. First and foremost, I take judicial notice of the fact that, the accused is likely to be interdicted until the case is over. He will therefore, not have access to the firearm provided by his former employer. However, if he elects to illegally acquire a firearm, to eliminate the witnesses, he understands well the consequences thereof. To hold at this stage that, he will do so without concrete evidence will be speculative, and unfair to him.

23. The prosecution did not advance any other reason to deny the accused bail or bond terms. He is not said to be a flight risk. His averments that, he is a Kenyan residing in Kenya with his family is not rebutted.

24. Finally, it suffices to note that, whereas in the past persons charged with murder would not be granted bail, following the Supreme of Kenya decision in the case of Muruatetu, the offence murder is bailable just like any other offence, the gravity of the offence and/or severity of the sentence is no longer an issue.

25. To conclude the matter, I find that, the prosecution has not adduced adequate evidence of any reasons that, would compel the court to deny the accused bail or bond. However, to determine the conditions thereof, I order that a pre bail report be prepared and presented to court within seven days of this order, to enable the court determine; inter alia, his social, moral and/or financial position of the accused and the deceased’s family views, alongside those of the community. Final orders will be made thereafter,

It is so ordered,

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 11TH DAY OF JANUARY, 2022

GRACE L NZIOKA

JUDGE

IN THE PRESENCE OF;

MR AMAYIO FOR THE APPLICANT

MS AKUNJA FOR THE RESPONDENT

APPLICANT PRESENT IN [PERSON

EDWIN COURT ASSISTANT